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Supreme Court of the United States

OCTOBER TERM 1949

No. 437

BELLE W. BARUCH,

Petitioner and Appellant Below,

vs.

BEECH AIRCRAFT CORPORATION,

Respondent and Appellee Below.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Respondent herein respectfully shows:

I.

STATEMENT OF THE CASE.

Due to the omission of many essential facts from petitioner's statement, respondent respectfully invites the Court's attention to the factual statement contained in the opinion of the Circuit Court of Appeals (175 *F. 2d* 1 at 2; R. 82, 83); and in addition the following essential facts:

(a) At the time of surrender of possession of the airplane on the morning of the accident by respondent, acting as gratuitous bailee, neither Horton, the pilot, nor Zozula, the mechanic, were under the influence of

intoxicating liquor (R. 33). Horton was in all respects normal, and he was not observed to be other than normal until some 30 minutes after possession of the airplane had been surrendered by respondent (R. 34).

(b) The C.A.B. had promulgated no rules pertaining to the operation of respondent's airfield, and no official or agent of the C.A.A. observing a pilot about to fly an airplane from a private airport under the influence of intoxicating liquor was vested with any authority under the C.A.A. regulations or the rules promulgated by the C.A.B. other than by remonstrance (R. 18). Likewise, the respondent had never been vested with authority from the C.A.A. or the C.A.B. to enforce any of the regulations respecting operation of airplanes on respondent's airfield (R. 70). The same also applied to DeSpain, respondent's hangar foreman.

(c) At all times in question petitioner's mechanic, John Zozula, was entirely sober, and when DeSpain suggested to Zozula that the flight be delayed (R. 73) Zozula expressed no concern as to Horton's condition (R. 56). Likewise, the extent of Horton's intoxication was not such as to render him helpless or wholly unable to take care of and protect himself. He was not incapacitated from flying an airplane, and at all times he had knowledge of what he was doing; he handled the airplane skillfully in maneuvering it to a proper position on the runway for a take-off (Finding 19; R. 36); and, as the trial court stated, "There was a great probability that he would take this plane off without mishap" (R. 30).

(d) Following the starting of the motors the airplane, under the sole control of petitioner's pilot and mechanic, was taxied away from the hangar to the run-

way, and some 10 to 15 minutes later the actual take-off took place (R. 73, 77). During this period prior to the actual take-off Zozula could have stopped the operation of the motors by cutting out the switch, and thereafter the motors could not have been moved (R. 66).

(e) At all times Horton, the pilot, and Zozula, the mechanic, were the agents, servants and employees of petitioner acting within the scope and course of their employment and were engaged in the business of the petitioner (R. 32).

The trial court rendered judgment in favor of respondent, and found that the destruction of the airplane and resultant damage suffered by petitioner were directly and proximately caused by the careless and negligent operation of the airplane by the agents, servants and employees of petitioner while the airplane was being operated upon the business of petitioner and while under the exclusive operation and control of petitioner's agents and employees (Finding 23; R. 37).

After petitioner's appeal was perfected she filed in the Circuit Court of Appeals a motion to remand the appeal to allow the trial court to entertain a motion for a new trial on the ground of newly discovered evidence. Following oral argument, the Circuit Court denied the motion, which opinion appears in 172 *F.* 2*d* 445. On appeal, the judgment of the District Court was affirmed, the opinion appearing in 175 *F.* 2*d* 1 (R. 81).

II.

ARGUMENT.

Summary of the Argument.

A. There is Nothing of Public Importance Involved in this Action.

B. The Action of the Circuit Court on Appeal Involved no Departure from the Usual Course of Judicial Procedure and did not Constitute any Denial of Due Process.

C. The Case was Properly based upon State Law and is not in Conflict with Decisions of Other Courts on the Same Matter.

A. There is Nothing of Public Importance Involved in this Action.

The action instituted by petitioner was an ordinary action for damages in which Belle W. Baruch sought to impose her loss resulting from the destruction of her airplane upon respondent, even though such loss was occasioned by her own pilot and mechanic while the airplane was under their sole operation and control and who were at all times acting in the course of their employment and upon petitioner's business. The determination of this action involved the application of only well recognized and established principles of law, and, except for the fact that the instrumentality destroyed was an airplane rather than an automobile or other vehicle, it was the same as many others which have been before the courts.

B. The Action of the Circuit Court on Appeal Involved no Departure from the Usual Course of Judicial Procedure and did not Constitute any Denial of Due Process.

Petitioner claims that the action of the Circuit Court of Appeals constituted a denial of due process of law, and is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. In support of this claim petitioner alleges that the Circuit Court of Ap-

peals refused to pass upon the cause of action for negligence, evading the issue by misstating that "*the record showed that negligence was neither pleaded nor relied upon by petitioner as a basis for recovery.*" (Petition 8 — Italics ours) The only misstatement is the foregoing allegation of petitioner. No such language appears in Judge Murrah's opinion. By attributing to the Circuit Court language not used, and separating it from the material to which it refers, petitioner suggests a meaning to the language actually used in the opinion which is foreign either to the intention of the court or to any reasonable interpretation. The language when read in its context seems perfectly clear.

The United States District Court found that petitioner's pilot and mechanic were guilty of contributory negligence, which was the direct and proximate cause of the destruction of petitioner's airplane (R. 37). This was recognized by the Circuit Court, both in its opinion on the motion to remand (172 *F. 2d* 445) and the opinion on appeal (175 *F. 2d* 1 at 2; R. 84). On appeal, apparently to avoid the legal effect of the findings of the District Court respecting petitioner's responsibility for the negligent acts of her agents and servants while engaged in her business and acting within the course of their employment, which resulted in the destruction of her airplane, petitioner (appellant) alleged in her brief and invoked in her argument the rule which would permit recovery from a party who without legal justification maliciously procured or induced the breach of a contract. It is this claim with which the Circuit Court is dealing in its opinion under (1) (175 *F. 2d* 1 at 3; R. 83, 84). Indeed, on page 3 of its opinion (R. 84) the court accepts the allegation of petitioner in her brief filed in the Circuit Court at page 22 as to the

essential elements necessary to establish her cause of action as follows:

> "Indeed, the appellant agrees that to establish her cause of action, she must show: (1) the existence of the contract between Horton and herself; (2) knowledge of that contract on the part of Beech; (3) an intentional interference with the known contract right without legal justification; and (4) resulting damages to her."

When the Circuit Court of Appeals states in its opinion:

> "The claim is not based on negligence. None is alleged or invoked as a basis for recovery."

the court is obviously referring to the claim of petitioner which it is analyzing; to the allegation that petitioner has admitted she must establish to maintain her claim, that is, "(3) an intentional interference with a known contract right without legal justification"; and to the oral argument advanced invoking the court's consideration of her contention.

After two oral arguments before the Circuit Court of Appeals, extensive briefs, two examinations of the evidence and the record by that court, and an exhaustive petition for rehearing, the fact that the Circuit Court bases is opinion largely upon the main contention urged upon it by petitioner in affirming the judgment of the district court hardly constitutes a denial of due process or calls for the exercise of supervisory authority by this Court.

C. The Case was Properly based upon State Law and is not in Conflict with Decisions of Other Courts on the Same Matter.

The accident here involved occurred in Wichita,

Kansas, and clearly shows that the Circuit Court, basing its decision upon applicable Kansas law, properly followed the decisions of this Court. *Erie R. Co. v. Tompkins,* 304 *U. S.* 64, 58 *S. Ct.* 817, 82 *L. Ed.* 1188. Likewise, this Court will depend upon the determination of the state law by the Circuit Court of Appeals (*Propper v. Clarke,* 337 *U. S.* 472, 69 *S. Ct.* 1333 at 1334); and as stated in *Regan v. Merchants Transfer Warehouse, Inc.* 337 *U. S.* 530, 69 *S. Ct.* 1233:

> "We ordinarily accept the determination of local law by the Court of Appeals (Huddleston v. Dwyer, 322 U. S. 232 at 237, 64 S. Ct. 1015 at 1018, 88 L. Ed. 1246), and we will not disturb it here."

This Court has likewise pointed out in the case of *Ruhlin v. N. Y. Life Ins. Co.,* 304 *U. S.* 202, 58 *S. Ct.* 860 at 861:

> "As to questions controlled by state law, however, conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

Petitioner overlooks this decision, and states (Petition 10):

> "The decision of the Court of Appeals that an essential element in such a cause of action is intent to cause a breach is concededly in conflict with the weight of modern authority, is in conflict with the decisions of the Courts of Appeals for the first and second circuits in Keene Lumber Co. v. Leventhal, 1 Cir., 165 F. 2d 815, and Sidney Blumenthal & Co. v. United States, 2 Cir., 30 F. 2d 247 * * * "

But here again the allegation made by petitioner is erroneous. The Circuit Court of Appeals accepted petitioner's own admission that to establish her cause of

action she must show "(3) an intentional interference with a known contract right without legal justification". Far from being in conflict with the decisions from the first and second circuits, those decisions were apparently relied upon by petitioner in making the statement of intent being an essential element to establish her cause of action.

In the Blumenthal case, in reversing the decision of the trial court and holding that the petition was sufficient, Judge Hand states:

> "But there is a substantial body of authority saying that liability depends upon the actor's intention to cause the breach, which puts upon him the duty to show some excuse or justification. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 256, 38 S. Ct. 65, 62 L. Ed. 260; Robins Dry Dock v. Flint, 275 U. S. 303, 48 S. Ct. 134, 72 L. Ed. 290 * * *."

Continuing further, and speaking with respect to the petition:

> "Nor can there be any question, at least prima facie, that the breach was intentionally caused."

Again, in the Keene Lumber Company case the court states at page 821:

> "There is ample precedent in the law of torts for imposition of liability upon a conscious wrongdoer whose tortious act, directly injuring the person or the property interests of X, intentionally causes a pecuniary loss to the plaintiff from the resulting interference with a relationship between X and the plaintiff * * * ",

and at page 822:

> "And where the promisee sues for a pecuniary loss intentionally caused by the defendant * * *."

This hardly represents conflict.

Respondent also suggests that, contrary to the allegation of petitioner (Petition 9), the Supreme Court of Kansas has determined that knowledge and intent are necessary to recovery in an action for inducing a breach of contract for an examination of the Kansas cases cited by the Circuit Court of Appeals, both as to conspiracy and fraud involved therein, knowledge and intent are essential to either or both.

It becomes apparent that the substance of the petition for certiorari is in reality a desire to secure a second hearing on appeal, and as was stated by this Court in *Magnum Import Co. v. Coty*, 262 *U. S.* 159, 67 *L. Ed.* 922, 43 *S. Ct.* 531 at 532:

> "Jurisdiction was not conferred upon this court merely to give defeated party in the circuit court of appeals another hearing."

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

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